Supreme Court, U.S.
FILED
JUL 1 1970
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 340

W. ASTOR KIRK and VIVIAN M. KIRK, *Petitioners*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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INDEX

	Page
Citations to Opinions Below	1
Jurisdiction	2
Questions Presented	2
The Statute Involved	2
Statement of the Case	2
Facts Found	3
Petitioner's Employer	3
Petitioner Was a Professional Employee	4
Rental Allowance Policy of the Board	4
Action of the Government	5
The Decision of the Court of Appeals	5
Reasons for Granting the Writ	6
I. The Appeals Court Has Decided an Important Question of Federal Law Which Should Be Settled by This Court	6
A. The question of the right of a taxpayer to raise a relevant and fundamental constitutional issue in a proceeding under 26 U.S.C. §6213(a)	6
II. The Court of Appeals Has Decided a Federal Question in a Way That Conflicts with Fundamental Principles Inherent in Applicable Decisions of This Court	7
A. The principle that the authority of government to act as a matter of "grace" is circumscribed by constitutional proscriptions and prescriptions	7
B. The principle respecting which party must sustain what burden where an issue of constitutional due process is asserted in a tax case	10

Page

III. This Case Involves a Constitutional Issue of Fundamental Public Importance Which Should Be Settled by This Court 11

A. The issue of whether or not government can, consistent with the stricture of the First Amendment's Establishment Clause, create a class of tax free rental allowances for "ministers of the gospel" alone 11

Conclusion 14

Appendix A—The Decision of the Court of Appeals, District of Columbia Circuit, March 9, 1970, entered March 9, 1970 ..... 1a

Appendix B—Internal Revenue Code of 1954, Section 107; and Section 6213(a) 7a

Appendix C—Memorandum Filed with Tax Return for 1964 ..... 7a

TABLE OF CASES

Abington School District v. *Schempp*, 374 U.S. 203 (1963) 13

New Colonial Ice Co. v. Helvering, 292 U.S. 435 (1934) 8

Sherbert v. Verner, 374 U.S. 398 (1963) 9

Speiser v. Randall, 357 U.S. 513 (1958) 9

United States v. Olympic Radio and Television, Inc., 349 U.S. 232 (1955) 8

Documents

Hearings on H.R. 8282, U.S. Congress, House Ways and Means Committee (89th Cong., 1st Sess.), Part 4 12

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners, W. Astor Kirk and Vivian M. Kirk, husband and wife, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled case on March 9, 1970.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals is reported at ..... (not yet officially reported). It is printed at Appendix A, *infra*, p. 1a. The decision of the Tax Court is reported at 51 T.C. 66 (1968). It is contained in the Joint Appendix, pp. 15-29.

JURISDICTION

The judgment of the Court of Appeals was entered on March 9, 1970. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

1) Where the government has a policy and program of maintaining a class of tax free rental allowances, where only ecclesiastical factors are used to define that class, and where a rental allowance is excluded from the said class by the Commissioner of Internal Revenue solely on the ground that the recipient of the rental allowance in question does not have the requisite ecclesiastical status; is the resultant discrimination against that recipient in violation of due process requirements of the Fifth Amendment?

2) Where the government employs ecclesiastical factors exclusively (a) to define a class of tax free rental allowances and (b) to exclude a particular individual's rental allowance from the privileged class thus defined, does this constitute governmental action respecting an establishment of religion within the meaning of the First Amendment?

THE STATUTE INVOLVED

The statutory provisions involved are the following sections of the Internal Revenue Code of 1954: § 107, 26 U. S. C. § 107; and § 6213(a), 26 U. S. C. § 6213(a). They are printed at Appendix B, *infra*, p. 73a.

STATEMENT OF THE CASE

This case arises out of an exclusion by the Commissioner of Internal Revenue, on September 8, 1966, of petitioners'[1] rental allowance from the government's

[1] Vivian M. Kirk is joined as petitioner only by reason of the filing of a joint return with her husband.

class of tax free rental allowances. That exclusionary act of the Commissioner resulted in a deficiency in petitioner's tax returns for tax year 1964. Petitioner filed a written protest against exclusion of his rental allowance from the government's class of tax free rental allowances. Since the protest involved only constitutional considerations, the Appellate Division of the Internal Revenue Service summarily rejected it, and the Commissioner issued a statutory notice of deficiency.

On November 21, 1966, petitioner filed a petition with the Tax Court, pursuant to 26 U. S. C. § 6213(a) (Appendix B, *infra*, p. 7a), praying in effect that the Tax Court issue such order as may be necessary to prohibit the government from "arbitrarily and unreasonably" discriminating against him. The Tax Court rendered its opinion on October 17, 1968, and on November 26, 1968, it entered its decision against petitioner. Petitioner filed a Notice of Appeal to the Court of Appeals for the District of Columbia on February 24, 1969. The Appeals Court affirmed the decision of the Tax Court on March 9, 1970. Petition for rehearing was denied on April 9, 1970.

FACTS FOUND

The essential facts were stipulated. The Court of Appeals accepted the findings of fact made by the Tax Court. Thus, the facts briefly stated herein are those summarized by the Court of Appeals.

A. PETITIONER'S EMPLOYER

Petitioner (W. Astor Kirk) was employed during the tax year 1964 by the General Board of Christian Social Concerns of the Methodist Church, an agency of that denomination which promotes, sponsors and ad-

ministers programs of social research, education, and action covering a broad range of issues of national and international importance. Petitioner served as director of the Department of Public Affairs in the Board's Division of Human Relations and Economic Affairs.

B. PETITIONER WAS A PROFESSIONAL EMPLOYEE

W. Aster Kirk was one of twelve professional employees of the Board, nine of whom were ordained ministers in the Methodist Church. Petitioner, however, was not an ordained, commissioned, or licensed minister of the gospel, although he is a member of the Methodist Church, a denomination which provides for ordination of its ministers. The services provided by petitioner as an employee of the Board "were not different in character from those performed by the eleven remaining professional employees . . . These services were not sacerdotal in character, nor did they involve the conduct of religious worship."

C. RENTAL ALLOWANCE POLICY OF THE BOARD

Petitioner's employer maintained a policy of providing rental allowances for all of its professional employees. Petitioner received a rental allowance in the amount of $2,624.97 during the tax year 1964. He treated this sum as if it were included in the government's class of tax free rental allowances, and made a full disclosure of the fact that it was not reported as taxable income. Petitioner's rental allowance constituted a part of the remuneration for the services rendered by him to the Board, and the entire allowance was used "to rent or otherwise provide a home during tax year 1964."

D. ACTION OF THE GOVERNMENT

Pursuant to 26 U. S. C. § 107 (Appendix B, *infra*, p. 7a) the rental allowance was allowed by the government as an exclusion from income taxation for the nine "ministers of the gospel" employed by the Board, but was not so allowed for petitioner and the other two professional employees who are not "ministers of the gospel."

DECISION OF THE COURT OF APPEALS

The Court of Appeals affirmed the decision of the Tax Court (Appendix A, *infra*, p. 6a). It held that (1) exemptions of rental allowances from tax liability are a matter of governmental "grace"; (2) since petitioner is not a "minister of the gospel," his rental allowance does not come within the purview of 26 U. S. C. § 107(2); and (3) since petitioner cannot benefit from the provisions of that statute, he cannot challenge the constitutionality of the government's scheme of classification represented by 26 U. S. C. § 107(2). Thus, the Court of Appeals refused to decide the fundamental substantive issued raised by petitioner: As applied to the facts of his case, does the definitive use of ecclesiastical norms by the government to define a tax-free class of rental allowances, from which class his allowance is excluded, violate prohibitions of the Fifth and First Amendments?

REASONS FOR GRANTING THE WRIT

I. THE APPEALS COURT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT

A. The Question of the Right of a Taxpayer To Raise a Relevant and Fundamental Constitutional Issue in a Proceeding Under 26 U. S. C. § 6213(a)

Under 26 U. S. C. § 6213(a) (Appendix B, *infra*, p. 7a), a taxpayer may challenge a determination of tax deficiency with respect to his tax return. In the instant case, the determination of tax deficiency is an integral part of an acknowledged scheme of governmental class definition. In his petition for a redetermination of deficiency pursuant to the provisions of 26 U. S. C. § 6213(a), petitioner challenged the validity of the scheme of class definition. He contended that, in the context of the facts of his case, that scheme involves constitutionally impermissible discrimination against him; and, additionally, it amounts to governmental action respecting an establishment of religion.

That constitutional issue was asserted before both the Tax Court and the Court of Appeals. The latter Court decided, at least inferentially, that a proceeding under 26 U. S. C. § 6213(a) does not afford a proper procedure for raising and asserting a constitutional issue of "impermissible discrimination," or of invalid governmental action "respecting an establishment of religion." The only apparent exception permitted by the appeal court's ruling is where a taxpayer is able to show that he would derive a direct and tangible *financial benefit* from a judicial declaration that discrimination against him is constitutionally impermissible or that the governmental scheme of class definition is otherwise invalid.

Thus, presumably if the scheme of classification provided that only in the case of a *white* person may a

rental allowance be exempted from taxation, then a *Negro* recipient of a rental allowance would be precluded from utilizing 26 U.S.C. § 6213(a) to challenge the constitutional permissibility of the discrimination inherent in the statute.

The Petition filed with the Tax Court assigned as an error of the Notice of Deficiency "an interpretation of law" which denies to petitioner the right "not to be arbitrarily and unreasonably discriminated against" with respect to relief of rental allowance income from the burden of taxation. (Joint Appendix, p. 4).

Apart from any rights of a taxpayer, it would seem to be a caricature of the judicial function to limit a court's jurisdiction, in a proceeding under 26 U.S.C. § 6213(a), to reviewing the *correctness* of a deficiency solely in terms of its consistency or lack thereof with a public policy which itself is constitutionally suspect.

This Court should settle the question of the standing of a party with a bona fide and primary interest in the outcome of the litigation to raise a relevant and fundamental constitutional issue inextricably involved in a proceeding initiated under 26 U.S.C. § 6213(a).

II. THE COURT OF APPEALS HAS DECIDED A FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH FUNDAMENTAL PRINCIPLES INHERENT IN APPLICABLE DECISIONS OF THIS COURT

A. The Principle That the Authority of Government To Act as a Matter of "Grace" Is Circumscribed by Constitutional Proscriptions and Prescriptions

The Court of Appeals appears to have assumed that governmental "grace" is without constitutional parameters. Hence an inference can be drawn, reasonably and easily, from that Court's decision that government may discriminate at will among recipients of rental

allowances, with respect to granting a privilege of exempting such allowances from tax liability. In any event, the decision of the Court of Appeals has a practical effect of sanctioning the proposition that a taxpayer whose rental allowance is excluded from a governmentally defined category of tax exempt rental allowances, is precluded from challenging the constitutionality of the particular scheme of classification involved. The Court of Appeals cited *New Colonial Ice Co.* v. *Helvering*, 292 U.S. 435 (1934), and *United States* v. *Olympic Radio and Television, Inc.*, 349 U.S. 232 (1955), as authority for that proposition. Neither of these cases can be invoked to support a premise that the authority of government to act as a matter of "grace" is uncircumscribed by constitutional limitations.

In *New Colonial Ice Co.* v. *Helvering*, this Court simply affirmed the general rule that "whether and to what extent" any income is exempt from tax liability "depends upon legislative grace." *Ibid.*, p. 440. In *United States* v. *Olympic Radio and Television*, this Court merely recognized that a particular tax exemption is obtained "not as a right, but as of grace." Hence the taxpayer company there involved had "the burden to show that it is within the provision allowing the deduction." *Ibid.*, p. 235.

Thus the central issue in *New Colonial Ice Co.* v. *Helvering* and *United States* v. *Olympic Radio and Television* did not involve a constitutional question. The only question was whether or not the taxpayers who were parties to those cases could be brought within statutory provisions, uncontested as to their constitutional validity, which allowed particular tax deductions.

An entirely different fundamental issue is involved in the instant case. It is the issue whether or not the government may constitutionally use ecclesiastical norms alone either (1) to delineate a class of tax free rental allowances, or (2) to exclude a particular allowance from an otherwise valid tax exempt category. Neither is the issue here a question of impartial treatment of all persons acknowledged to be within the scope of a privileged class created by governmental action; rather, it is a question of the constitutional propriety of excluding certain individuals from the privileged class solely because they are not "ministers of the gospel."

Any assumption that *New Colonial Ice Co.* v. *Helvering* and *United States* v. *Olympic Radio and Television* provide authority for a premise that any exercise of governmental "grace" is constitutionally uncircumscribed is eroded by this Court's decisions in *Speiser* v. *Randall*, 357 U.S. 513 (1958), and *Sherbert* v. *Verner*, 374 U.S. 398 (1963).

In *Speiser* v. *Randall*, this Court unequivocally informed California government officials that they were

> "plainly mistaken in their argument that, because a tax exemption is a 'privilege' or 'bounty,' its denial may not infringe speech." *Ibid.*, p. 518.

In the same case, on the other hand, this Court acknowledged approvingly the recognition by the California courts

> "that conditions imposed upon the granting of privileges or gratuities must be reasonable." *Ibid.*, p. 518.

In *Sherbert* v. *Verner*, this Court flatly rejected the argument of South Carolina that its unemployment

compensation statute was immune to constitutional challenge because unemployment compensation benefits are not a matter of "right" but merely a "privilege." *Ibid.*, p. 404. This Court emphatically stated that,

> "It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." *Ibid.*, p. 404.

This Court should decide whether or not it is constitutionally permissible for the government, purporting to act as a matter of "grace," to exempt from tax liability only rental allowances received by Board employees who are "ministers of the gospel."

B. The Principle Respecting Which Party Must Sustain What Burden Where an Issue of Constitutional Due Process Is Asserted in a Tax Case

The Court of Appeals held that petitioner must sustain the burden of proving that his rental allowance comes within the scope of exemptions allowed by 26 U.S.C. § 107(2) (Appendix B, *infra*, p. 7a). That holding of the Court of Appeals is in error. The only burden that petitioner must sustain is that of proving the following proposition: That he is entitled to have his rental allowance treated no differently from the treatment of the rental allowance of other employees of the Board, *unless a differential treatment can be justified as directly and substantially supportive of a legitimate public objective within the constitutional competence of the government to effectuate.*

On the other hand, the government must sustain the burden of proving that its discrimination against rental allowances received by Board employees who

are not "ministers of the gospel" is supportive of a constitutionally legitimate end related to the public interest.

This Court has recognized the principle that constitutional due process is "an interest of transcending value." *Speiser* v. *Randall*, 357 U.S. 513, 525-526. Where a due process right is asserted in a tax case challenging the validity of discrimination against a taxpayer, the government must sustain the burden of proving that its scheme of classification is "reasonable," or is otherwise permissible. *Ibid.* Thus, due process considerations command that no taxpayer shall be discriminated against with respect to rendering his rental allowance for taxation unless the government has borne the burden of proving that a public purpose within the scope of its constitutional competence to effectuate, is or will be accomplished thereby.

This Court should settle the question of whether or not the government shall be required to justify, on reasonable grounds related to a valid public interest, its scheme of classification, which discriminates against Board employees who are not "ministers of the gospel" with respect to their rental allowance income.

III. THIS CASE INVOLVES A CONSTITUTIONAL ISSUE OF FUNDAMENTAL PUBLIC IMPORTANCE WHICH SHOULD BE SETTLED BY THIS COURT

A. The Issue of Whether or Not Government Can, Consistent With the Strictures of the First Amendment's Establishment Clause, Create a Class of Tax Free Rental Allowances for "Ministers of the Gospel" Alone

Because of its restricted application of 26 U.S.C. §6213(a) (Appendix B, *infra*, p. 7a), the Court of Appeals refused to decide the question raised by petitioner, of whether or not preferential relief of

"ministers of the gospel" of the burden of taxation of rental allowance income, contravenes the prohibitions of the First Amendment's Establishment Clause.

Throughout this Nation, hundreds of thousands of professionally trained persons who are not "ministers of the gospel," are employed by religious, charitable, and educational private nonprofit entities.[2] A substantial number of such employees, like petitioner in the instant case, receive rental allowance income as part of the compensation for their services. They, as well as the organizations which employ them, have a genuine interest in this case. Thus, the issue of the validity of the government's policy of providing a preferential subvention for "ministers of the gospel" is a constitutional issue of fundamental public importance.

Petitioner has a direct, personal, and primary interest in obtaining judicial scrutiny of the government's policy involved here. Exemption of rental-allowance income from taxation is essentially a government subsidy. In the instant case, if petitioner's rental allowance were included in the government's tax free category, the net value to him of the subsidy would be $557.33. (Appendix A, *infra*, p. 1a). A Board employee not allowed that subsidy, *for no reason other than the fact that he is not a "minister of the gospel,"*

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[2] One report has shown, for example, that in 1965 more than 68,000 non-ministers were employed by all the national agencies and local non-profit entities related to the Methodist Church. See U. S. Congress, House Committee on Ways and Means (89th Cong., 1st Sess.), *Hearings on H. R. 8282*, Part 4, p. 1608. Relative to the size of their membership and scope of activities, other denominations and interdenominational bodies employ a similar number of professionally trained non-ministers.

is entitled to know if any public interest is served by granting that subsidy to his colleagues who are clergymen.

This case was initiated with one paramount purpose in mind. (See Memorandum Filed with Tax Return for 1964, Appendix C, *infra*, p. 8a). That purpose is to secure judicial scrutiny of the government's policy and program incorporated in 26 U.S.C. § 107(2) (Appendix B, *infra*, p. 7a).

While the government is surely under no obligation to exempt any rental allowance income from tax liability, the imposition of a condition that a recipient thereof be a clergyman to qualify such income for the gratuitous benefit of tax exemption, is of doubtful constitutional validity.

The principles for judging whether or not a public policy like that incorporated in 26 U.S.C. § 107(2) conforms to the requirements of the Establishment Clause, have evolved from a series of historic decisions of this Court. The authoritative principles derived from those decisions are epitomized in the rule that governmental actions affecting religious interests are sustainable under the Establishment Clause only if such actions are in pursuit of a *secular purpose* and have, in their actual operation, *a primary secular effect*. *Abington School District* v. *Schempp*, 374 U.S. 203 (1963), p. 222.

This Court should settle the question whether or not (1) an identifiable secular purpose and (2) a primary secular effect are in fact involved in the government's exclusion from its category of tax free rental allowances *those rental allowances received by Board employees who are not "ministers of the gospel."*

APPENDIX A

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,901

W. ASTOR KIRK and VIVIAN M. KIRK, APPELLANTS

v.

COMMISSIONER OF INTERNAL REVENUE

Appeal from the Tax Court of the United States

Decided March 9, 1970

Mr. W. Astor Kirk, pro se, for appellants.

Mr. Leonard J. Henzke, Jr., Attorney, Department of Justice, for appellee. *Mr. Johnnie M. Walters*, Assistant Attorney General, *Mr. Lee A. Jackson*, *Mr. Lester B. Snyder*, and *Mr. Louis M. Kauder*, Attorneys, Department of Justice, were on the brief for appellee.

Before: McGOWAN and MACKINNON, *Circuit Judges*, and *JAMESON, *Senior District Judge*.

JAMESON, *District Judge*: This is an appeal from a decision of the Tax Court[1] affirming the Commissioner's determination of a deficiency in income tax due from appellants, W. Astor Kirk and Vivian M. Kirk,[2] for the tax year 1964 in the amount of $557.33. Appellants resided in Washington, D.C. during the tax year 1964 and in Austin, Texas, when their petition was filed. They have stipulated that the decision of the Tax Court may be reviewed by this court.[3]

* Sitting by designation pursuant to the provisions of Title 28 U.S. Code Section 294(d).

[1] Kirk v. Commissioner of Internal Revenue, 1968, 51 T.C. 66.

[2] Vivian M. Kirk is joined as appellant only by reason of the filing of a joint return with her husband.

[3] Pursuant to 26 U.S.C. § 7482(b)(2).

The facts are stipulated. W. Astor Kirk was employed during the tax year 1964 by the General Board of Christian Social Concerns of the Methodist Church,[4] an organization which promotes, sponsors and administers programs of social research, education, and action covering a broad range of issues of national and international importance.[5] Kirk served as director of the Department of Public Affairs in the Board's Division of Human Relations and Economic Affairs.

Kirk was one of twelve professional employees, nine of whom were ordained ministers in the Methodist Church. Kirk, however, "was not an ordained, commissioned, or licensed minister of the gospel",[6] although he is a member of the Methodist Church, which provides for ordination of its ministers.

The services provided by appellant as an employee of the Board "were not different in character from those performed by the eleven remaining professional employees * * *. These services were not sacerdotal in character, nor did they involve the conduct of religious worship".

The Board maintained a policy of providing housing and allowances for all of its professional employees. Appellant received a rental allowance in the amount of $2,624.97 during the tax year 1964. This sum was not reported as in-

[4] Pertinent excerpts from the 1964 edition of the Doctrines and Disciplines of the Methodist Church describing the organization, powers, duties and responsibilities of the Board were attached to the stipulation as a joint exhibit.

[5] The issues include race relations, civil liberties, public policy on education, church and state relations, American foreign policy, the United Nations and related international organizations, disarmament and nuclear weapons control, drug control, foreign aid, alcohol problems, juvenile delinquency, mental health, problems of aging, population and planned parenthood, and the penal system and rehabilitation of criminals.

[6] It was further stipulated that appellant had no intention "of becoming an ordained, commissioned or licensed minister of the gospel in any religious denomination of whatsoever nature".

come, although appellants did make a full disclosure of the fact that the sum was not reported. This rental allowance constituted a part of the remuneration for the services rendered by Kirk to the Board, and the entire allowance was used "to rent or otherwise provide a home during tax year 1964".

26 U.S.C. § 107 provides:

> "In the case of a minister of the gospel, gross income does not include—
>
> (1) the rental value of a home furnished to him as part of his compensation; or
>
> (2) the rental allowance paid to him as part of his compensation, to the extent used by him to rent or provide a home."

Pursuant to this section the rental allowance was allowed as an exclusion for the nine "ministers of the gospel" employed by the Board, but not for the three professional employees who were not ministers of the gospel.

Appellants seek an order which would "Prohibit the Commissioner from arbitrarily and unreasonably discriminating against * * * Kirk with respect to a taxpayer's privilege of excluding from gross income the rental allowance paid, as part of compensation, by the board to rent or otherwise provide a home". In essence appellants contend (1) that the determination of the Commissioner that they are not entitled to the exclusion is "an arbitrary, unreasonable, and hence impermissible" discrimination against the taxpayer; and (2) that "[a] governmental determination denying Kirk the exclusion of his rental allowance from taxation, while the exclusion is granted to his associates who are ministers, violates the establishment clause of the First Amendment".

It is a well established rule that exclusions and deductions are matters of "legislative grace; and only as there is clear provision therefor can any particular deduction be allowed". New Colonial Ice Co. v. Helvering, 1934, 292 U.S.

435, 440, 54 S.Ct. 788, 78 L.Ed. 1348.[7] "The taxpayer has the burden to show that it is within the provision allowing the deduction". United States v. Olympic Radio and Television, Inc., 1955, 349 U.S. 232, 235, 75 S.Ct. 733, 99 L.Ed. 1024.

Appellants have failed to sustain this burden. Section 107(2) is unambiguous. It excludes rental allowance from the gross income of a "minister of the gospel". The Tax Court found that the excerpts from the Methodist Church Discipline "clearly establish the Board of Christian Social Concerns as an institution dedicated to the spreading of the 'gospel'—the glad tidings or message of Methodism". Accordingly under the statute and applicable regulations[8] an ordained minister of the gospel employed by the Board was entitled to the exclusion of his rental allowance from his gross income.

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[7] See also Deputy v. DuPont, 1940, 308 U.S. 488, 493, 60 S.Ct. 363, 84 L.Ed. 416; Interstate Transit Lines v. Commissioner, 1943, 319 U.S. 590, 593, 63 S.Ct. 1279, 87 L.Ed. 1607, reh. den. 320 U.S. 809, 64 S.Ct. 26, 88 L.Ed. 489.

[8] In discussing the applicable statute and regulations, the Tax Court said:

> "Paragraph (2) of section 107 appeared first in the Internal Revenue Code of 1954 to clarify the discrepancy between rental allowances paid by congregations and residences actually furnished by them. As to the latter case, paragraph (1) of section 107, originally section 213(b)(11) of the Revenue Act of 1921, had excluded from gross income the rental value of a dwelling house furnished to a minister of the gospel as part of his compensation.
>
> "Section 1.107-1, Income Tax Regs., provides that in order to qualify for the exclusion, the rental allowance must be provided as remuneration for services which are ordinarily the duties of a minister of the gospel. Section 1.1402(c)-5(b)(2), Income Tax Regs., provides that 'service performed by a minister in the exercise of his ministry includes * * * the control, conduct, and maintenance of religious organizations (including the religious boards, societies, and other integral agencies of such organizations) * * *.'" 51 T.C. at ——.

In holding that the exclusion was not available to appellants, the Tax Court well said:

> "Granting that petitioner performed services that are ordinarily the duties of a minister of the gospel, another requirement of the regulations is that petitioner *be* a minister of the gospel. Specifically the regulations *require* him to be 'a duly ordained, commissioned, or licensed minister of a church or a member of a religious order.' * * * Petitioner is a member of a church which provides for the ordination of ministers. He does not claim to be ordained. Nor is he 'licensed' in the sense that he has any official document or other indicia of permission, formally conferred upon him, to perform sacerdotal functions. We do not think he is 'commissioned.' No congregation or other body of believers was committed to his charge. The duty of spreading the gospel, either by sermon or teaching, was not formally entrusted to his care. Petitioner here is merely a non-ordained church employee. *Robert D. Lawrence*, 50 T.C. 494 (1968). Furthermore, all the services performed by petitioner in this case were of secular nature."
>
> * * *
>
> "The exclusion is not provided to a broad class of persons from which petitioner is excluded solely because he is not a minister. The exclusion is granted by legislative grace to *ministers of the gospel* alone. All persons who are not ministers are denied this grace, * * *. The Commissioner has not unconstitutionally discriminated against the petitioner by denying him the benefit of an exclusion he has not shown himself entitled to." (Emphasis in original) 51 T.C. at ——.

We agree. It was expressly stipulated that Kirk was not a "minister of the gospel". Appellants accordingly are not entitled to the benefit of the exclusion.[9]

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[9] Appellants' reliance on Abraham A. Salkov, 1966, 46 T.C. 190, 199 is misplaced. In that case the Tax Court concluded that

With respect to appellants' contention that section 107(2) violates the constitution for the reason that it tends toward the establishment of religion, the Tax Court suggested that this was "an interesting inquiry", but refused "to pursue it * * * because petitioner would not be entitled to the exclusion in any event".

As we read appellants' briefs, it is their position that the denial to them of an exclusion of income allowed ministers of the gospel constitutes an impermissible constitutional discrimination and a violation of the establishment clause of the First Amendment. If, however, appellants should be found correct in this contention and section 107(2) should be held invalid as an impermissible discrimination or as a law "respecting the establishment of religion", it would not affect the tax liability in this case. Rather ministers of the gospel would then no longer be entitled to the benefits of the exclusion.

This proceeding was instituted in the Tax Court by a "petition for redetermination of the deficiency set forth by the Commissioner * * * in his notice of a deficiency". It is not an action by a taxpayer challenging alleged unconstitutional federal taxing or spending programs.[10] Assuming that appellants as taxpayers could in a proper action raise the constitutional issues here asserted, neither the Tax Court nor this court may properly consider these issues in this proceeding, particularly in view of the fact that appellants would not in any event be entitled to the exclusion.

Affirmed.

"a full-time cantor of the Jewish faith, qualifies as a 'minister of the gospel' within the spirit, meaning and intendment of section 107". There is no contention here that Kirk qualifies as a minister of the gospel.

[10] Upon demonstrating the necessary "personal stake" in the outcome of the litigation, taxpayers in a proper action may challenge allegedly unconstitutional federal taxing and spending programs. Flast v. Cohen, 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968); Protestants and Other Americans, Etc. v. Watson, 132 U.S.App.D.C. 329, 407 F.2d 1264 (1968).

APPENDIX B

Internal Revenue Code of 1954 (26 U.S.C.)

Section 107. Rental value of parsonages.

"In the case of a minister of the gospel, gross income does not include—

(1) the rental value of a home furnished to him as part of his compensation; or

(2) the rental allowance paid to him as part of his compensation, to the extent used by him to rent or provide a home."

Section 6213. Restrictions applicable to deficiencies; petition to Tax Court.

"(a) *Time for filing petition and restriction on assessment.* Within 90 days, or 150 days if the notice is addressed to a person outside the States of the Union and the District of Columbia, after the notice of deficiency authorized in section 6212 is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. Except as otherwise provided in section 6861 no assessment of a deficiency in respect of any tax imposed by subtitle A or B and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 90-day or 150-day period, as the case may be, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 7421 (a), the making of such assessment or the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court."

APPENDIX C

Memorandum Filed With Tax Return for 1964

To: District Director, Internal Revenue Service.

From: W. Astor Kirk.

Subject: Housing Allowance.

1. The adjusted gross income listed in line 9, page 1 (Form 1040) enclosed herewith does not include the rental allowance paid to me by my employer, as part of my compensation, for the purpose of providing a house for me and my family.

2. I am one of twelve professional staff persons employed by my employer, the General Board of Christian Social Concerns of The Methodist Church. Though I am not an ordained clergyman, the professional services which I render to the board are no different from those rendered by my staff colleagues. As a senior executive with professional training (Ph. D. degree in political science and economics) and experience in social science research and college teaching, I have the responsibility of planning and directing the board's social research and education programs in public affairs.

3. Since the board established its national headquarters in Washington, D. C., it has provided a rental allowance for all of its professional staff, as part of each staff person's compensation, which allowance is to be used to rent or otherwise provide a home.

4. Under the facts set forth in paragraphs 2 and 3 above, it is asserted that administrative non-application of Section 107 of the Internal Revenue Code to the rental allowance paid to me by my employer would be arbitrary, unreasonable, and discriminatory administrative action. Such action would deprive me of property without due process of law. See *Bolling* v. *Sharpe*, 347 U. S. 497.

5. If the reply to paragraph 4 hereof be that Section 107 of the Internal Revenue Code permits no administrative discretion under the circumstances stipulated in paragraphs 2 and 3 above, then I must (and do hereby) assert that the said section of the code is contrary to the "no establishment of religion" clause of the First Amendment. The controlling rule is that any legislative enactment is constitutionally invalid if its *purpose* or *primary effect* is either the advancement or inhibition of a religious interest. See *Abington School District v. Schempp*, 374 U. S. 203, at p. 222.

/s/ W. Astor Kirk
W. Astor Kirk
April 12, 1965

Supreme Court, U.S.
FILED
JUL 16 1970
E. ROBERT SEAVER, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. 340

W. ASTOR KIRK AND VIVIAN M. KIRK, Petitioners

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

ADDITIONAL APPENDICES

W. Astor Kirk
4530 Connecticut Avenue, N.W.,
Washington, D. C. 20008
Pro se, for Petitioners.

CONTENTS

	Page
Order Denying Petition for Rehearing	1
Decision of the Tax Court	2
Opinion of the Tax Court	3

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,901 September Term, 19 69

W. Astor Kirk and Vivian M. Kirk,

Appellants

v.

Commissioner of Internal Revenue

Before: McGowan and MacKinnon, Circuit Judges, in Chambers.

ORDER

On consideration of appellants' petition for rehearing, it is

ORDERED by the Court that appellants' aforesaid petition is denied.

Per Curiam

United States Court of Appeals
for the District of Columbia Circuit

Nathan J. Paulson
CLERK

TAX COURT OF THE UNITED STATES

[illegible]

Petitioners,

v. Docket No. 6333-66

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION

Pursuant to the opinion of the Court filed October 17, 1968, and incorporating herein the facts recited in the respondent's computation as the findings of the Court, it is

ORDERED and DECIDED: That there is a deficiency in income tax due from the petitioners for the taxable year 1964 in the amount of $557.33

NORMAN O. TIETJENS

Judge.

Entered: NOV 26 1968

* * * * * *

It is hereby stipulated that the foregoing decision is in accordance with the opinion of the Court and the respondent's computation, and that the Court may enter this decision, without prejudice to the right of either party to contest the correctness of the decision entered herein.

Petitioner

Petitioner

[illegible] URETZ

RLL

LESTER R. URETZ,
Chief Counsel,
Internal Revenue Service.

51 T. C. No. 8

TAX COURT OF THE UNITED STATES

W. ASTOR KIRK and VIVIAN M. KIRK, Petitioners v. COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket No. 6333-66. Filed October 17, 1968.

Petitioner was employed by the General Board of Christian Social Concerns of the Methodist Church. He was not an ordained, licensed, or commissioned minister and performed no functions of a sacerdotal character. Held, under the facts, petitioner was not a minister of the gospel within section 107, I.R.C. 1954, and therefore not entitled to an exclusion for designated rental allowance paid to him by the Board as part of his compensation and used by him to furnish a home.

W. Astor Kirk, pro se.

Robert J. Curphy, for the respondent.

OPINION

TIETJENS, Judge: The Commissioner determined a deficiency in petitioners' Federal income tax for the taxable year 1964 in the amount of $765.56. The only issue presented is whether

petitioners may exclude from gross income a rental allowance paid to petitioner, W. Astor Kirk, by the General Board of Christian Social Concerns of the Methodist Church. The exclusion is claimed under section 107(2), I.R.C. 1954.[1]

The facts have been fully stipulated and the case submitted under Rule 30. The stipulation of facts and the exhibits attached thereto are incorporated herein by this reference.

W. Astor Kirk and Vivian M. Kirk are husband and wife. They resided in Washington, D. C. during their taxable year 1964 and filed a joint income tax return for that year with the district director of internal revenue, Baltimore, Maryland. They resided in Austin, Texas at the time they filed their petition herein.

W. Astor Kirk, hereinafter referred to as petitioner, was not an ordained, commissioned, or licensed minister of the gospel in the taxable year 1964.

During 1964 petitioner was employed by the General Board of Christian Social Concerns of the Methodist Church (hereinafter sometimes referred to as the Board). The Board provides

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[1] All statutory references are to the Internal Revenue Code of 1954 unless otherwise noted.

a housing allowance for each of its professional employees. Petitioner served on the Board as director of the Department of Public Affairs in the Board's Division of Human Relations and Economic Affairs. The services provided by petitioner were not different in character from those performed by eleven other professional employees of the Board, nine of whom were ordained ministers in the Methodist Church. These services were not sacerdotal in character, nor did they involve the conduct of religious worship.

The professional staff of the Board is required by the Discipline[2] to promote, sponsor and administer programs of social research, education, and action with respect to a broad range of social issues and problems, including the following:

Race relations.
Civil liberties.
Public policy on education.
Church and state relations.
American foreign policy.
United Nations and related international organizations.
Disarmament and nuclear weapons control.
Drug control.
Foreign aid.
Alcohol problems.
Juvenile delinquency.
Mental health.
Problems associated with aging, population, planned parenthood.
Penal system and rehabilitation of criminals.

---

[2] Doctrines and Disciplines of The Methodist Church set forth the organization, powers, duties and responsibilities of the Board.

As conceived by the professional staff of the Board, the fundamental objectives of such programs of research, education, and action are twofold: First, to affect in some determinate way the formation and execution of social policy, both in its public and private aspects. The term "social policy" was defined as consisting of all community decisions and actions of public and private individuals and groups which authoritatively allocate community values and resources. Second, an effort was made through programs of research, education, and action to influence patterns and structures of social relations, both public and private, in some determinate way.

In promoting, sponsoring and administering programs of research, education, and action, all of the required functions of the Board's professional employees, including those of petitioner, may be subsumed under the following generic categories:

1. Finding of facts and gathering of data regarding social issues and problems.
2. Identification of social issues and problems that should receive the attention of churches, in their status as organized social groups in society.
3. Careful delineation of issues and problems.
4. Selection of appropriate courses of action (i.e., efforts to affect social policy and influence patterns and structures of social relations) from available alternatives.

5. Establishment of priorities, and allocation and expenditure of resources (human, material, and financial).
6. Systematic evaluation of results of efforts over a definite period of time.
7. Periodic reporting of program results to members of the Board, thus insuring staff responsibility and accountability.
8. Recommendations to Board members with respect to future policy and needed changes in existing policies.

In the performance of the functions cited above, all of the Board's professional employees, including petitioner, promoted, sponsored and conducted such specific activities as the following: Study conferences, workshops, seminars and other similar type meetings; giving lectures at institutions of higher education; writing articles for national publications; preparing bibliographical materials dealing with particular social issues and problems; supervising and engaging in applied social research projects; assisting communities to resolve controversial problems such as those related to racial, religious and ethnic discrimination; and preparing documents, reports and testimony for presentation to Federal, state and local legislative and administrative bodies. None of the foregoing activities nor any other activities required of the Board's professional staff involved rendering services of a sacerdotal character or the conduct of religious worship.

As director of the Board's public affairs department, petitioner was assigned responsibility for promoting, sponsoring and administering programs of research, education, and action in the following social problem areas: Civil liberties and civil rights, church and state relations, public policy on education, housing and urban affairs, legislative reapportionment, and group participation in the political process.

As an employee of the Board, petitioner received a rental allowance from the Board in the amount of $2,624.97 in the tax year 1964, which sum was not reported as income by the petitioners in their 1964 joint income tax return, although petitioners did make a full disclosure of the fact that such sum was not reported. This rental allowance was designated as rental allowance by the Board prior to payment, and constituted a part of the remuneration for the services rendered by the petitioner to the Board. The petitioners used the entire rental allowance of $2,624.97 to rent or otherwise provide a home during 1964.

In his notice of deficiency, the Commissioner determined additional income in the amount of this allowance with the following explanation:

> It is determined that the $3,000[3] considered by you in your income tax return as an excludible rental allowance qualifying under section 107 of the Internal Revenue Code of 1954 is not properly excludible from income since you are not a "minister" within the meaning of section 107. Neither section 107 nor any other section of the Internal Revenue Code of 1954 provides for an exclusion of the $3,000 received by you and excluded from income reported by you in your return. Since you excluded the $3,000 from gross income reported, gross income has been increased by $3,000.

Section 61 defines gross income as all income from whatever source derived, including (but not limited to) compensation for services. The rental allowance here was in the nature of compensation and must be included in gross income unless a provision of the Code specifically excludes it.

Section 107(2) provides that, in the case of a minister of the gospel, gross income does not include the rental allowance paid to him as part of his compensation, to the extent used by him to rent or provide a home. The Board designated the $2,624.97 received by the petitioner as rental allowance. This amount was actually used by the petitioner to provide a home for himself and his family. Consequently, the Commissioner's narrow contention here is that the petitioner is not a "minister of the gospel" within the intendment of the statute.

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3 The parties have now stipulated that the correct amount actually received by petitioner as rental allowance was $2,624.97.

As commonly understood, "minister of the gospel" refers to a person who is ordained, commissioned, or licensed with the authority to perform sacerdotal functions, including the administering of the sacraments, preaching, and conducting religious services of worship. And "gospel" means glad tidings or message, teaching, doctrine, or course of action having certain efficacy or validity. Paragraph (2) of section 107 appeared first in the Internal Revenue Code of 1954 to clarify the discrepancy between rental allowances paid by congregations and residences actually furnished by them. As to the latter case, paragraph (1) of section 107, originally section 213(b)(11) of the Revenue Act of 1921, had excluded from gross income the rental value of a dwelling house furnished to a minister of the gospel as part of his compensation.

Section 1.107-1, Income Tax.Regs., provides that in order to qualify for the exclusion, the rental allowance must be provided as remuneration for services which are ordinarily the duties of a minister of the gospel. Section 1.1402(c)-5(b)(2), Income Tax Regs., provides that "service performed by a minister in the exercise of his ministry includes * * * the control, conduct, and maintenance of religious organizations (including

the religious boards, societies, and other integral agencies of such organizations), under the authority of a religious body constituting a church or church denomination." More specifically, subparagraph (ii) provides:

> Service performed by a minister in the control, conduct, and maintenance of a religious organization relates to directing, managing, or promoting the activities of such organization. Any religious organization is deemed to be under the authority of a religious body constituting a church or church denomination if it is organized and dedicated to carrying out the tenets and principles of a faith in accordance with either the requirements or sanctions governing the creation of institutions of the faith. The term "religious organization" has the same meaning and application as is given to the term for income tax purposes.

There can be no serious question that the petitioner in this case falls fairly within the bounds of the requirement of performing services which are ordinarily the duties of a minister. Indeed, nine of the eleven persons performing these same services were in fact ordained ministers of the Methodist Church. The Board clearly constitutes a religious organization which was formally dedicated to carrying out the tenets of the Methodist faith in accordance with the requirements or sanctions governing the creation of institutions of the faith. The Doctrines and Disciplines of The Methodist Church set forth the

tenets of Methodism and clearly establish the Board of Christian Social Concerns as an institution dedicated to the spreading of the "gospel"--the glad tidings or message of Methodism:

BOARD OF CHRISTIAN SOCIAL CONCERNS

Section I. Purpose and Names

¶1516. Through all of its history Methodism has sought to relate the gospel which it has preached to the life of its members and to the communities in which they have lived. It has sought to follow Christ in bringing the whole of life, with its activities, possessions, and relationships, into conformity with the will of God. To lift up before the members of the church and also the secular world the Christian concern for personal, social, and civic righteousness, to analyze the issues which confront the nation and the world as well as the local community and the person, and to propose Christian lines of action, there shall be a Board of Christian Social Concerns. The board shall be incorporated.

¶1517. Board members and executives of the board shall speak and act in the true freedom of forgiven men. Truth is possible when controversies, expected because of human differences, are conducted in Christian love. The board is expected to speak to the church its convictions, interpretations, and concerns. Recognizing the freedom of all Christian men, the board never presumes to speak for the whole church.

Granting that petitioner performed services that are ordinarily the duties of a minister of the gospel, another requirement of the regulations is that petitioner <u>be</u> a minister of

the gospel. Specifically the regulations require him to be "a duly ordained, commissioned, or licensed minister of a church or a member of a religious order." We have recognized that the purpose of this reference in the regulations is to exclude self-appointed ministers. Abraham A. Salkov, 46 T.C. 190 (1966), at page 196. As we said in Salkov, certainly the minister must be ordained, commissioned, or licensed: As interpreted by this Court in Salkov, the words "duly ordained, commissioned or licensed" are stated in the disjunctive. The regulation does not say only "ordained." It also says "commissioned or licensed." "Commission" means the act of committing to the charge of another or an entrusting; and "license" means an official document giving permission to engage in a specified activity. Salkov, supra, page 197. Petitioner is a member of a church which provides for the ordination of ministers. He does not claim to be ordained. Nor is he "licensed" in the sense that he has any official document or other indicia of permission, formally conferred upon him, to perform sacerdotal functions. We do not think he is "commissioned." No congregation or other body of believers was committed to

his charge. The duty of spreading of the gospel, either by sermon or teaching, was not formally entrusted to his care. Petitioner here is merely a non-ordained church employee. Robert D. Lawrence, 50 T.C. 494 (1968). Furthermore, all the services performed by petitioner in this case were of secular nature.

Perhaps the extended attention given above is unnecessary. We feel, however, that petitioner's obvious sincerity deserves some answer, even though his stipulation that he "was not an ordained, commissioned, or licensed minister of the gospel in tax year 1964" and "has no intention as of this date of becoming an ordained, commissioned or licensed minister of the gospel in any religious denomination of whatever nature" is enough to deny him the claimed exclusion.

Petitioner argues further that he is entitled to the exclusion provided in section 107 in spite of the fact that he is not a "minister of the gospel."

If we understand him, petitioner argues that because the ordained employees of the Board claimed exclusion of the rental allowance--considering themselves as performing duties of a minister in their administration of a religious organization

within the meaning of the quoted regulation--that it would be constitutionally impermissible for the Commissioner to discriminate against petitioner by denying him the same privilege solely on the ground that petitioner is not an ordained, commissioned, or licensed minister of the gospel.

To this effect, he contends that the Commissioner's regulations have created a class of employment--i.e., administration and maintenance of religious organizations including directing, managing or promoting the activities of such organization; that it is with respect to that class of employment that the rental allowance is excludable; that petitioner is engaged in such employment (as are the nine ordained ministers whose exclusions apparently have not been challenged by the Commissioner), and that the exclusion is denied him solely because he is not a minister. This argument misconceives the function of section 107 and the regulations enacted thereunder.

The exclusion is not provided to a broad class of persons from which petitioner is excluded solely because he is not a minister. The exclusion is granted by legislative grace to ministers of the gospel alone. All persons who are not ministers

are denied this grace, including the Commissioner of Internal Revenue and the Judges on this Court. The Commissioner has not unconstitutionally discriminated against the petitioner by denying him the benefit of an exclusion he has not shown himself entitled to.

Even so, argues petitioner, we should hold that section 107 violates the Constitution for the reason that it tends toward the establishment of religion. That is an interesting inquiry. We refuse to pursue it, however, because petitioner would not be entitled to the exclusion in any event.

Decision will be entered under Rule 50.

No. 340

FILED
JUL 29 1970
E. ROBERT SEAVER, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1970

W. ASTOR KIRK AND VIVIAN M. KIRK, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the Tax Court (JA 15-28)[1] is reported at 51 T.C. 66. The opinion of the court of appeals (Pet. App. 1a-6a) is reported at 425 F. 2d 492.

JURISDICTION

The judgment of the court of appeals was entered on March 9, 1970. A petition for rehearing was de-

[1] "JA" references are to the joint appendix originally filed in the court of appeals and now on file in this Court.

nied on April 9, 1970. The petition for a writ of certiorari was filed on July 1, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether the courts below correctly held that petitioner,[2] an employee of a church agency who concededly was not a minister and whose services were of a secular nature, was not entitled to the benefits of Section 107 of the Internal Revenue Code, which excludes from the gross income of a "minister of the gospel" compensation paid to him in the form of a rental allowance.

STATUTES INVOLVED

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 61. GROSS INCOME DEFINED.

(a) *General Definition.*—Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:

(1) Compensation for services, including fees, commissions, and similar items;

* * * *

SEC. 107. RENTAL VALUE OF PARSONAGES.

In the case of a minister of the gospel, gross income does not include—

[2] References to petitioner are to W. Astor Kirk. Vivian M. Kirk is a party to this proceeding only by reason of the filing of a joint income tax return.

(1) the rental value of a home furnished to him as part of his compensation; or

(2) the rental allowance paid to him as part of his compensation, to the extent used by him to rent or provide a home.

STATEMENT

Petitioner was one of twelve professional employees of the General Board of Christian Social Concerns of the Methodist Church during 1964, the taxable year here in issue (Pet. App. 2a; JA 16-17). This Board promotes, sponsors and administers programs of social research, education, and action with respect to a broad range of social issues and problems, including civil liberties and race relations (JA 17). Petitioner was a member of the Methodist Church, which provides for ordination of its ministers, but he was not an ordained, commissioned, or licensed minister of the gospel and had no intention of becoming one (JA 9-10; Pet. App. 2a).

Nine of the twelve professional employees of the Board were ordained ministers of the Methodist Church (JA 11, 17; Pet. App. 2a). The services performed by petitioner were not different in character from those performed by the eleven other professional employees. They were not sacerdotal in character and did not involve the conduct of religious worship, but were of a secular nature. (JA 13, 17, 26; Pet. App. 2a.)

As an employee of the Board, petitioner received a rental allowance from the Board of $2,624.97 in 1964 (JA 13, 20; Pet. App. 2a). This rental allow-

ance constituted a part of petitioner's remuneration for services rendered to the Board and was used in 1964 for rent or for otherwise providing him a home (JA 13-14, 20; Pet. App. 3a).

Petitioner did not report the rental allowance on his 1964 tax return, although he did make full disclosure of the fact that the sum was not reported, claiming that it was excludable from his gross income under Section 107 of the Internal Revenue Code of 1954 (JA 13, 20; Pet. App. 2a-3a). The Commissioner disallowed the claimed rental allowance exclusion (JA 21), and the Tax Court sustained the Commissioner's determination on the ground that petitioner concededly was not an "ordained, commissioned, or licensed minister," as required by Section 107 and the applicable regulations (JA 21-27). The court deemed it unnecessary to pass on petitioner's further contention that Section 107 is unconstitutional, since petitioner would not be entitled to the benefits of that section if it were declared invalid (JA 27-28). On appeal, the Court of Appeals for the District of Columbia Circuit affirmed (Pet. App. 1a-6a).

ARGUMENT

The decision below, affirming that of the Tax Court, is correct. There is no conflict or any other reason for further review.

1. Section 61(a)(1) of the Internal Revenue Code of 1954, *supra*, p. 2, defines "gross income" as "all income from whatever source derived," including "Compensation for services." Section 107(2), *supra*, pp. 2-3, provides that "In the case of a minister of the

gospel, gross income does not include * * * the rental allowance paid to him as part of his compensation, to the extent used by him to rent or provide a home." [3] The special tax exemption benefit accorded by Section 107, like any other tax exemption, is a matter of legislative grace and must be strictly construed. See *United States* v. *Stewart*, 311 U.S. 60, 71; *Better Business Bureau* v. *United States*, 326 U.S. 279, 283; *Bingler* v. *Johnson*, 394 U.S. 741, 751-752. Since petitioner concedes (Pet. 4), as was stipulated below (JA 9-10), that he was not an ordained, commissioned, or licensed "minister of the gospel" within the meaning of Section 107 and the applicable Treasury Regulations,[4] the court below properly upheld the

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[3] Section 107 had its origin in Section 213(b)(11) of the Revenue Act of 1921, c. 136, 42 Stat. 227, which allowed an exclusion for "The rental value of a dwelling house and appurtenances thereof furnished to a minister of the gospel as part of his compensation." The statute was apparently enacted as a result of a Treasury Ruling, O.D. 862, 4 Cum. Bull. 85, to the effect that the fair rental value of the use of a church parsonage by a clergyman constituted taxable compensation for services. See Zipperstein, *Taxation of Clergymen*, 41 Taxes 219. In 1954, Congress extended the exclusion to cash allowances paid to ministers who do not live in church-furnished homes, to place them on an equal tax footing with those to whom housing is provided. S. Rep. No. 1622, 83d Cong., 2d Sess., pp. 16, 186.

[4] Treasury Regulations on Income Tax (1954 Code), Section 1.107-1(a) (26 C.F.R.), provide in part that:

> § 1.107-1 *Rental value of parsonages.*
>
> (a) * * * (2) * * * In order to qualify for the exclusion, the home or rental allowance must be provided as remuneration for services which are ordinarily the duties of a minister of the gospel. In general, the rules

Tax Court's decision that he did not qualify for the income-exclusion benefits granted by Section 107.

2. As pointed out by both courts below (JA 26-28; Pet. App. 6a), petitioner's challenge to the constitutionality of Section 107, even if upheld, cannot aid his cause. For if the section were deemed invalid because constitutionally impermissible, the result would be to deny its benefits to those who would otherwise qualify for them—"ministers of the gospel"—not to extend them to other taxpayers who, like petitioner, fall outside that category. In the words of the court below (Pet. App. 6a), to declare Section 107 unconstitutional "would not affect the [petitioner's] tax liability in this case. Rather ministers of the gospel would then no longer be entitled to the benefits of the exclusion." Under these circumstances, there is no reason to consider petitioner's constitutional claim on the merits. This is not a case where a taxpayer who does not contest his tax liability, brings an action to test the validity of a federal taxing statute or spending program. Compare *Flast* v. *Cohen*, 392 U.S. 83. On the contrary, petitioner disputes his tax liability and brought this action in the Tax Court for a redetermination of that liability.

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provided in § 1.1402(c)-5 will be applicable to such determination. * * *

Treasury Regulations, Section 1.1402(c)-5, referred to above, repeat the language of Section 1402(c)(4) of the Code, which excludes from the self-employment provisions of the social security tax "the performance of service by a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry * * *."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
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JOHNNIE M. WALTERS,
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HARRY BAUM,
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JULY 1970.

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